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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 203.

JACQUES RICHARD MAURICE HENNESSY [illegible],
APPELLANT,

vs.

RICHARDSON DRUG COMPANY,
APPELLEE.

BRIEF FOR APPELLANT.

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Supreme Court of the United States,

OCTOBER TERM, 1902, No. 203.

JACQUES RICHARD MAURICE HENNESSY and others,
Appellants.

vs.

RICHARDSON DRUG COMPANY,
Appellee.

Brief for Appellants.

This is an appeal from a decree of the Circuit Court of the United States for the District of Nebraska, dismissing the bill of the appellants. Decrees dismissing the bills brought against Walter Moise and against Carrie R. May and others were entered at the same time. Appeals were taken from the decrees in the three cases. By a stipulation of the parties properly filed it was agreed that only the record in the Richardson case should be printed, as the same questions are involved in all, and that the appeal in the other cases should be heard on the record in this case.

The bills were brought by the complainants, who are engaged in producing, bottling and ex-

porting a liquor known as Hennessy Brandy, against the defendant, who is charged with selling brandy under the name of Hennessy Brandy, using fac similes of complainants' trade-name, devices and labels, all of which are fully set out in the complaint. The complaint alleges that the complainants are "all of Cognac in France" and "citizens of the Republic of France" (see fol. 6 of the Record), and that the defendant is a citizen of the State of Nebraska. It is alleged that the value of the trade-mark exceeds the sum of $2,000 (fol. 7 of Record).

The defendant answered the complaint and did not specifically deny that the complainants were citizens of the Republic of France nor did he raise any objection to the jurisdiction of the Court. He denies that the brandy sold by the complainants under their label and trade-mark is imported brandy at all and alleges that it is produced and bottled in the United States, and he claims that the alleged trade-mark is a fraud used to deceive the public (see fol. 14 of Record), and charges various other fraudulent acts on the part of the complainants (fol. 15). The answer admits that defendant is a citizen of the State of Nebraska, but denies, amongst other things, that the defendant has sold brandy with labels counterfeiting the labels used by the complainants.

After the case was submitted on the pleadings and proofs, the Court dismissed the bill, delivering an opinion, which is made part of the record (fols. 33-36).

After stating that no case is made out under the Act of 1881, the Court decides that the several bills do not plead jurisdictional facts to give complainants a standing, because complainants' citizenship or alienage is not alleged, as required (fol. 34).

The Court finds that there is no doubt of the

value of complainants' trade-mark and that it is now and for years has been fully established, that it is denied by none and that decrees of the Court in these cases in favor of complainants could not give them a stronger title or more substantial showing than they now have. Leave to amend so that what the Court considered proper allegations about citizenship could be made was denied because the claim asserted by complainants was considered by the Court to be technical, and it was therefore the opinion of the Court that "more nearly justice would be done by ending the cases where they now are" instead of exercising the powers of the Court to grant an injunction and ordering a reference to ascertain a small amount of damages, all entailing much costs.

On the 3rd day of August a decree was entered dismissing the bills. The assignment of errors was that the Court erred in dismissing complainants' bill for want of jurisdiction (fol. 39), and the petition of appeal was for an order allowing said complainants to prosecute the appeal from said decree on the sole question of jurisdiction (fol. 4).

The decree originally entered dismissed the bill without stating expressly that the dismissal was on the ground of want of jurisdiction and the complainants asked to have the decree amended so as to show this fact. The Court, however, entered another decree *nunc pro tunc*, which is found in fol. 43 of the record, expunging the original decree, making the written opinion "part of the record of the case as expressing the views of the Court," finding that "neither the bill nor the bill as amended nor the evidence shows the citizenship of the complainants or any of them so as to confer jurisdiction upon this Court" and "further" finding that the bill as amended is without equity, and for both and all these reasons dismissing the

bill. The order allowing the appeal is found in fol. 45 and the certificate of appeal is found in fol. 47. In it the Court certifies "that the question of jurisdiction referred to in the opinion was passed upon, but that the case was also determined on the merits."

The errors relied upon are in substance: first, that the Court erred in holding that the allegations as to citizenship of the complainants were not sufficient; second, that it was incumbent on the complainants to prove such allegations and, third, that it attempted to pass on the merits after deciding that it had no jurisdiction.

POINTS.

I.

The Circuit Court erred in holding that the jurisdictional facts as to the complainants' citizenship were not properly alleged.

The Constitution and the Judiciary Act provide that the Federal Courts shall have jurisdiction as to controversies where the necessary jurisdictional amount is involved "between citizens of a State and foreign States, citizens, or subjects thereof." The complaint alleges that complainants are all citizens of the Republic of France. We claim that this clearly and indubitably complies with the statutory provision. It would not have been sufficient to allege that the complainants are aliens but the allegations must be to the effect, as was done here, that they are either citizens or subjects of a foreign State (Wilson v. City Bank, 3 Sumner, 422). The cases cited by the learned Judge below

in no way indicate that this allegation is insufficient.

The case of Stuart v. Easton, 156 U. S., 46, holds that the fact of alienage must affirmatively appear and it holds that the allegation that a party is a citizen of the City of London is not sufficient. The decision is based on the fact, as was suggested by Judge Lacombe in the case of Betancourt v. M.R. F. Life Ass'n, 101 Fed. Rep., 305, that London is not a free and independent country,—not a State within the meaning of that word as used in the Constitution and Judiciary Act. That case, therefore, is in no way an authority in support of the proposition that the allegation that the party is a citizen of the Republic of France, which is a free and sovereign State, is insufficient to show jurisdiction where the defendant, as in this case, is a citizen of a State of the Union.

The case of Rondot v. Township of Rogers, 79 Fed. Rep., 676, held that an allegation that the complainant was a resident of Ontario, Canada, and a citizen of the Dominion of Canada and of the Empire of Great Britain was insufficient.

It is unnecessary to discuss whether that case was properly decided and did not extend the doctrine laid down by this Court beyond its original limits. It might be said in support of it that it is improper to allege that a person who resides in a monarchical government is a citizen but that the proper allegation would be that he is a subject of the monarch to whom he owns allegiance. In our case, as France has a republican form of government, the allegation that he is a citizen of such government, is sufficient.

The distinction here insisted upon between the words "citizen" and "subject" is recognized by this Court in the case of United States v. Wong Kim Ark, 169 U. S., 649, 662, 664. It cites with

approval the case of United States v. Rhodes, 1 Abb. U. S., 28, in which it is said "all persons born in the allegiance of the King are natural born subjects and all persons born in the allegiance of the United States are natural born citizens." Again it cites the words used in State v. Manuel, 4 Dev. & Bat., 20, 24, 26: "The term *citizen* in our law is precisely analagous to the term *subject* in the common law and the change of phraseology has entirely resulted from the change of government. The sovereignty has been transposed from one man to the collective body of the people and a subject of the King is now a citizen of the State."

Judge McPherson interprets the words "citizens or subjects" as if they read "citizens and subjects." While it is true that sometimes the word "or" may be changed to "and" in interpreting a statute, this is only so where the word "and" as used would lead to absurd results and would be clearly contrary to the intention of the Legislature.

Endlich on Statutes, Sec., 305.

In this case no such necessity exists, as the meaning of the statute is perfectly clear and we venture to say has never before, as to this point, been doubted.

II.

The Court erred in holding that it was incumbent on the complainants to prove the allegation of citizenship.

If it is held by this Court that the allegation of the citizenship of complainants was sufficient, it is clear that the burden of proving such allegation to be untrue is on the defendant. This is so even if the objection to the jurisdiction has been properly

taken by the defendant. The doctrine on this point is well stated in the recent case of Adams v. Shirk, 117 Fed. Rep., 801:

"The question is not, as plaintiff in error contends, whether defendants in error have discharged the burden of proving that Elbert W. Shirk was a citizen of Indiana. The proper allegation of jurisdictional facts, *prima facie*, was true. Simply to deny that Elbert W. Shirk was a citizen of Indiana would not show a want of jurisdiction. He may have been a citizen of some other state than Illinois, of which plaintiff in error was a citizen. That Elbert W. Shirk was a citizen of Illinois was a material and necessary allegation. It was an affirmative averment, the burden of proving which even under a proper plea in abatement would have fallen on plaintiff in error (Sheppard v. Graves, 14 How., 505, 512; De Sobry v. Nicholson, 3 Wall., 420). Under the plea in the present case, the office of which was no broader than a motion or a suggestion to the Court to protect itself from imposition, the burden most assuredly was upon the moving party. Plaintiff in error introduced no evidence on the subject. The evidence of defendants in error does not establish that Elbert W. Shirk was a citizen of Illinois and that the Circuit Court was imposed upon."

In the case at bar there was no plea to the jurisdiction or plea in abatement, nor was the objection to the jurisdiction raised in the answer. No evidence contradicting the allegation as to the citizenship of Appellants was introduced by defendants. The Court acted on its own motion. In order to justify this action it must appear from the record that the suit did not involve a controversy of which the Court could properly take cognizance.

Act of March 3, 1875 (18 Stat., 472).
Morris v. Gilmer, 129 U. S., 315, 326.
Anderson v. Watt, 138 U. S., 694, 701.

The only evidence in this record bearing on the

subject is the statement by the Appellants (page 11) that they reside in Cognac, France.

Even if the burden were on the complainants to prove the correctness of that allegation as to their citizenship, proof of their residence in France would be *prima facie* sufficient.

Shelton v. Tiffin, 6 How., 163.
Express Company v. Kountze Bros., 8 Wall., 342.
Collins v. City of Ashland, 112 Fed. Rep., 175.

But, as already stated, the burden to prove lack of the necessary diversity of citizenship is on the defendant and there certainly is nothing in the statement that the complainants are residents of Cognac to prove that they are citizens of Nebraska.

III.

The Court erred in assuming to pass on the merits after it had determined the question that it had no jurisdiction and its attempt to do so must be treated as a mere nullity.

On reading the opinion of the Court below, which is made part of the record, it is impossible to come to a different conclusion, but that the Court at that time was of the opinion that the complainants had made out their case but that their claim was so technical that it seized the opportunity afforded by what it considered a lack of jurisdictional allegations to dismiss the bill, in order not to have to do what otherwise would have been its duty, namely, to grant an injunction. If this were not so, why was leave to amend refused? If the Court had intended to decide the matter on the

merits there was no reason whatever why the jurisdictional defect should not have been remedied. While we disclaim any intention to argue the merits of this case before this Court, we simply wish to say that it is difficult to see how the Court below could have come to any other conclusion but that complainants were entitled to at least an injunction where it finds that the complainants have proved their trade-mark beyond question; and that the defendants have sold goods bearing counterfeit labels, even if such sales were made in good faith (Saxlehner v. Siegel Cooper Co., 179 U. S., 42).

Nor do we wish to comment on the strange reluctance of the Court to grant an injunction against parties who try to defeat complainants by charging them with the most atrocious frauds, although on the evidence the Court finds that the trade-mark of complainants is so firmly established that no decree of the Court can give them a better assurance.

In the amended decree the Court, while dismissing the bill for lack of the necessary jurisdictional allegations, "further" dismisses it on the merits. And in the certificate, while certifying that it has passed on the question of jurisdiction, it states that the merits have also been passed upon.

We claim that the Court had no power both on general principles and in virtue of the express provisions of the statute from which it derives its jurisdiction, to pass on the merits after it had decided that it had no jurisdiction. Its attempt to do so must be treated as an absolute nullity.

It is a well settled principle that a Court, even of general jurisdiction, should not pass on the merits after it has denied its own jurisdiction in the premises. This principle is well expressed by the Supreme Court of Virginia in the case of Tay-

lor v. Mutual Reserve Fund Life Association, 97 Va. 60.

> "Whenever a Court determines that it has no jurisdiction of a case it should express no opinion upon the merits of the controversy. The only course which a Court can rightfully pursue in such a case is to decline to speak at all where it cannot speak by the law."

In Howard v. Kentucky & Louisville Mutual Ins. Co., 52 Ky., 282, the defendant interposed two pleas, the first denying the jurisdiction and the second one being a defense on the merits. The plaintiff demurred to both pleas and both demurrers were overruled by the Trial Court. On appeal the Court held that the demurrer to the first plea was improperly overruled, but although it found that the Court below had jurisdiction it held that it was error for the Court below to pass upon the second demurrer, which involved the merits, saying:

> "Nor should the second demurrer have been acted upon by the Court, as the effect of its decision upon the first demurrer was to put the plaintiff out of Court. We shall therefore regard the judgment as having been pronounced upon the question of jurisdiction made under the first demurrer and the parties as occupying the same attitude they would have done if the Court had not acted at all upon the second demurrer."

See also to the same effect:

Stough v. C. & N. W. R. R. Co., 71 Ia., 641.

Gray v. Dean, 136 Mass., 128.

Wheeler & Wilson Mfg. Co., v. Whitcomb, 62 N. H., 411.

This Court has consistently followed the principle here contended for. In the exercise of its

original jurisdiction it has always declined to express an opinion on the merits in cases where it came to the conclusion that it had no jurisdiction. (See Minnesota v. Hitchcock, 185 U. S., 373). And it has adopted the same rule in the exercise of its appellate jurisdiction even where the merits had been fully discussed before it.

In the case of Metcalf v. City of Watertown, 128 U. S., 586, Mr. Justice Harlan has used the following language:

> "Although the question of the jurisdiction of the Circuit Court over the present suit was suggested at the bar, the case was argued entirely with reference to the construction and effect of the Statute of Wisconsin, prescribing, in respect to causes of action accruing before November 1, 1878, ten years as the period within must be commenced, "an action upon a judgment or decree of any Court of Record of any state or territory within the United States, or of any Court of the United States," while twenty years was fixed, by the same statute, for the commencement of "an action upon a judgment or decree of any Court of Record of this (that) State." The Court below held the suit to be barred by the limitation of ten years. Rev. Stat. Wis., 1858, Chap. 138, Secs. 1, 14, 15, 16; *Id.*, 1878. *We are not, however, at liberty to express any opinion upon the question of limitation*, if the Court, whose judgment has been brought here for review, does not appear from the record, to have had jurisdiction of the case. And whether that Court had or had not jurisdiction is a question which we must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits."

Following the same pinciple it has repeatedly reversed the decrees of the lower Court dismissing bills upon the merits in cases where such Court had

no jurisdiction and has directed that the bill should be dismissed without prejudice.

Barney v. Baltimore City, 6 Wall., 280.
Kendig v. Dean, 97 U. S., 423.
Parker v. Ormsby, 141 U. S., 81, 83.
Lake County Commissioners v. Dudley, 173 U. S., 243, 253.

The provision of the statute in virtue of which the Court below acted fully recognizes this principle. The question of the jurisdiction was not raised by the defendants and the sufficiency of the jurisdictional allegations was not challenged by them. The Court acted of its own motion. The statute giving it such power expressly says that "if any suit commenced in the Circuit Court * * * it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve the dispute or controversy properly within the jurisdiction of said Circuit Court * * * the said Circuit Court *shall proceed no further but shall dismiss the suit.*" (Act of March 3, 1875, Chap. 137, Sec. 5).

This provision has been the subject of numerous adjudications by this Court. It has been held that this proviso of the Act of 1875 is a salutary one and that it is the duty of the Circuit Court to exercise their power under it in proper cases.

Williams v. Nottawa, 104 U. S., 209.
Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S., 282.

It has further been held that the action of the Circuit Court is reviewable by this Court under the Act of March 3, 1891, Chapter 517, Sec. 5.

Wetmore v. Rymer, 169 U. S., 115, 118.
Huntington v. Laidley, 176 U. S., 668.

In the case of United States v. Jahn, 155 U. S., 109, this Court, in considering the course to be pursued in the various cases where the question of jurisdiction of the Court has been passed upon, says:

"Where the jurisdiction of the Circuit Court is in issue and decided in favor of the defendants, *as that disposes of the case*, the plaintiff should have the question certified and take his appeal or writ of error directly to this Court."

The express words of the statute and the cases interpreting it all tend to show that before the question of merits can be considered, where the Court decides that it has no jurisdiction, an opportunity must be given to the complainant to have the jurisdictional question reviewed by the Supreme Court. If that Court agrees with the Court below the case is at an end. If it holds that the Court had jurisdiction it will send the case back for further proceedings. Then for the first time a decision on the merits will be made and from that decision, if adverse to the complainant, an appeal can be taken to the Circuit Court of Appeals.

The appellants in this case have done exactly what the law requires them to do. Their assignments of error and the petition for appeal, show that the only question they asked this Court to review is the question of jurisdiction.

This is not a case where there can be any doubt from the record whether the question of jurisdiction has been passed upon. The opinion which this Court will consult for the purpose of ascertaining on what ground the decision was based (Loeb v. Columbia Township Trustees, 179 U. S., 472) not only shows that the question was passed upon, but taken by itself would indicate that the Court

did its duty and after deciding the jurisdictional question adversely to the complainants "proceeded no further in the case." From the decree it appears that the jurisdictional question was decided first and that after deciding it the Court "further" finds as to the merits. These facts alone would be sufficient to show that the jurisdiction of this Court was properly invoked even without a certificate (*In re* Lehigh Min. & Mfg. Co., 156 U. S., 322). But in this case the judge has certified that the jurisdictional question was determined and expressly refers to the *opinion* as embodying his views. Can, under these circumstances, the complainant's right to a review of the jurisdictional question by this Court, a right which, as is said in Wetmore v. Rymer, 169 U. S., 115, 120, was expressly reserved to them in the statutes, be affected by an absolutely illegal act of the Court, in contravention of the statute from which it derives its powers and existence? We claim that it cannot, and that the most charitable course this Court can take is to treat the statements of the Court below, in which it certifies as to its own illegal acts, as surplusage.

Nor can any life be injected into such attempted finding on the merits by the decision of this Court that the Court below had jurisdiction. The purpose of the statute, as we argued, is that the question of jurisdiction, if its existence is denied by the Court below, should be settled before the merits are touched. The complainants, when they appealed on the jurisdiction question to this Court, as was their duty and right, could not, even if they had wished to, have appealed to the Circuit Court of Appeals on the merits, because the statute does not permit of two appeals in the same case. (McLish v. Roff, 141 U. S., 661). They had a right to treat such decision as a nullity. If any

effect were given to it because the Court below improperly denied its own jurisdiction, it would follow that although they followed the only course open to them, they might be deprived by the lapse of time of the right given to them by statute to have the decision on the merits reviewed by the Circuit Court of Appeals.

IV.

The decree should be reversed and the cases remanded to the Court below for further proceedings.

Respectfully submitted,
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